1613. *July* 13. HOME *against* HOMES.

No 5.

In an action of reduction by Patrick Home of Polwarth, *contra* John Home of Heugh and Alexander Home of Johnscleugh, the LORDS granted process against the minor against the principle of the brocard, quod minor non tenetur placitare super hæreditate; and that because the minor was only called for his interest, albeit it was reasoned that his interest was such as could not be miskenned, he being infeft in the lands as heir to his father and in possession.

Kerse, fol. 141.

*** Haddington reports this case:

IN the action betwixt the Laird of Polwarth and the gudeman of the heugh, Alexander Home of Johnscleuch, ane of the parties called for his interest, *alleged* na process, because he was minor and was heritablie infeft in ane part of the lands controverted, likeas his father and himself had been in possession thereof mony years, and his father had intimate his sasine in effect to the pursuer's father judicially by production thereof at the time of the pursuer's father's service and retour to thir same lands, and the said Alexander being minor, non tenebatur placitare super hereditate. It was *answered*, That his evidents were not called for principaliter, nor na reason conceived against them particularly, but only against the sasines of Robert Home of the Heugh, the reduction whereof could not be staid be the interest of any minor having only subaltern infeftments; in respect whereof, the LORDS repelled the allegeance.

Haddington, MS. No 2518.

1624. *November* 25. HAMILTON *against* MATHESON.

No 6.

A purchaser of land who had granted a subaltern right to a minor's predecessor being attacked in a reduction, was found not to have the privilege of stopping process till the minor's majority, altho' if the reduction should succeed, it behoved to affect the minor's interest.

IN an action betwixt Hamilton *contra* Matheson and others, for reducing of a contract of alienation of lands, and of diverse subsequent securities of the said lands made to subaltern persons *in consequentiam*, as depending upon that contract; the LORDS found, that one of the defenders being minor, whose father had acquired a subaltern right of a part of the said lands disponed by the said principal contract, which was principally quarrelled; and being heritably infeft in a part thereof, ought not to be compelled to dispute upon her heritage in her minority; albeit it was *replied* by the pursuer, That seeing her right was not principally nor originally quarrelled, but only was a dependence upon a contract made betwixt other parties; and which contract was only drawn in question upon nullity; that therefore her minority could not hinder the course of the process for annulling of that contract, wherein she nor her father were not parties, they having only acquired a subaltern right, as said is, from the party contracter; against the which principal contracter the action was pur-

No 6.

sued; which reply was not respected; for the LORDS found, That a minor ought not to dispute upon heritage, whether they had right thereof originally, which was controverted, or if the same depended upon another original, and so would fall *in consequentiam*; in neither of which cases, the LORDS found that the minor ought to dispute her right.

In this action, notwithstanding of the minor's exeuse foresaid for her part of the land, yet process was sustained against the rest of the defenders who were majors, for the remanent of the land whereto the minor had no right, albeit it was *alleged* by the defender, that *propter continentiam causæ*, process ought to stay for the whole land during the minority foresaid, in respect that it was alleged that if the cause should decide against the rest of the defenders, that decision would militate thereafter against the minor, when she should be convened in her majority; so that the admitting of her minority now to stay process against herself, would not be profitable to her thereafter; and, seeing the subject controverted was only a contract, which was a body of a writ and could not be divided, the same ought not to be reasoned betwixt any other parties, but ought to cease for them all; which allegeance was repelled, and process found against the majors, seeing the minor had gotten the benefit of the law by staying of process against her, which ought not to hinder the course of law against majors; but it is to be considered, that minors being in ward, and during their ward called to warrant any deed, which otherwise they are obliged to warrant, are not holden to answer during the time of their ward before their perfect age; which privilege for that space also, exeems the cautioner's sons who are majors, for the conjunction of the cause, and is marked in my notes out of Craig, 2. lib. Feud. fol. 155.

Act. *Nicolson et Stuart.* Alt. *Hope et Oliphant.* Clerk, *Gibson.*

Fol. Dic. v. 1. *p.* 588. *Durie, p.* 153.

*** Spottiswood reports this case:

THERE having passed a mutual contract for alienation of some lands in Leith, between Margaret Porteous and J. Matheson 1593; this contract was sought to be reduced by Hamilton, son and heir to the said Margaret, because it was imperfect, John Matheson not having subscribed the same. *First*, It was *alleged* for Jean Christie, daughter and heir to ——— Christie her father, to whom Matheson had annalzied part of the said lands, that this being a plea of heritage, and she minor, non tenebatur placitare super hæreditate. *Replied*, Her heritage was not quarrelled *primario*, but only *in consequentiam*, and so ought not to have the benefit of that law. THE LORDS having sustained the partial exception for her, it was *alleged* by the remanent defenders, That *propter continentiam causæ* the rest's case could not be severed from her's, seeing her right would reduce as well as the rest's, if the contract whereupon all their rights depended, were not sustained. THE LORDS granted process for the rest, pro-

viding always that whatsoever was done against them should not be prejudicial to her. So that all the benefit she had in the interim was to brook her possession unquarrelled during her minority. V. Stat. 2do Roberti I. c. 17. Ubi privilegium uni collitigantium ratione minoris ætatis concessum, alteri prodest; nam beneficium collatum uni porrigitur ad consortem. No 6.

Spottiswood, (MINORS and PUPILS.) *p.* 210.

*** Kerse also reports this case:

FOUND quod minor non tenetur placitare super hereditate paterna, albeit his infeftment be craved to fall *in consequentiam*. But the LORDS denied *continentiam causæ*, and found process against the majors to reduce the contract and right called for, and so could not extend the benefit of the privilege *ad majores*.

This same found, albeit the father was not infeft, the son always succeeding as heir to his father's conquest, 23d June 1625, Pringle against Home, *(infra.)*

Kerse, MS. fol. 146.

1625. *June* 23. PRINGLE *against* KER and E. HOME.

No 7.
The plea of *minor non tenetur* was sustained where the heir was infeft, tho' his predecessor was not.

IN a reduction pursued by Pringle, against Sir John Ker and the Earl of Home, for reducing of Sir John Ker's right of some lands of Coldstream, upon a reason libelled against the same; and consequently, for reducing of the Earl of Home's right depending thereupon, and flowing from Sir John Ker *in consequentiam*; the LORDS found the Earl of Home, being minor, ought not to be compelled to dispute upon this reason, seeing the question was *super hæreditate paterna*, whereupon he ought not to be called in question during his minority. And it being *replied* for the pursuer, That the privilege of minority ought not to stay this process, and that the maxim foresaid, viz. Quod minor non tenetur disputare super hæreditate paterna, militates not in this case for two reasons; 1*mo*, Because his right nor his father's were not *primario*, nor principally called to be produced and reduced, but were desired to be reduced in consequence, as depending upon Sir John Ker's right, which was principally quarrelled, and against the which right, his reason was conceived; and that the said axiom had place only where the minor was pursued when his father's right was principally drawn in question, which not being here, the process ought not to be delayed upon his minority; 2*do*, The said maxim had place only where the minor's father was infeft in the lands which were controverted; so that if the father died not seased in the lands, and that the minor was not infeft therein as heir to him, his minority could not excuse him. These answers were repelled, and notwithstanding of the same, the LORDS found that the minor, during his minority, was not holden to dispute, for albeit his right was desired but to fall